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No. 81-2169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GILBERT A. HARING, Lieutenant,
Arlington County Police Department;
HENRY W. ALLEN, Detective;
J. R. BADEY, Detective;
ALVIN BEUCHERT, Officer;
THOMAS TRUMBLE, Officer;
STANLEY GARBER, Officer,

Petitioners,

vs.

JOHN FRANKLIN PROSISE,

Respondent.

On Writ Of Certiorari to the United States
Court of Appeals for the Fourth Circuit

REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can a person who has pleaded guilty in a state criminal court to manufacturing illegal drugs, and who did not raise the validity of search that produced the essential evidence of the crime, subsequently bring an action in a federal court under 42 U.S.C. § 1983 claiming that the search was unconstitutional?

a. By pleading guilty in a state criminal court, does a person waive any right to litigate in a § 1983 action the constitutionality of the search which produced the essential evidence of the crime?

b. Does a conviction based upon a plea of guilty collaterally estop the later litigation in a federal court § 1983 action of the search and seizure claim, where the state court expressly found a sufficient factual basis for the plea and that basis was the evidence produced by the search?

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REPLY TO ARGUMENT MADE BY PROSISE IN HIS OPPOSITION BRIEF

I. INTRODUCTION.

Prosise unfairly characterizes the petitioning police officers as merely "disgruntled litigants." Response Brief at p. 6. To support this claim he

makes several arguments: (1) the Fourth Circuit erroneously interpreted the Virginia law of estoppel; (2) there is no conflict between the Fourth and Tenth Circuits on this matter because it is "not at all clear" the Tenth Circuit[1] would rule the same as it did; (3) the Fourth Circuit did not overlook the finding of the state court that the search provided the factual basis of the guilty plea but rather chose to ignore such findings "in favor of a general rule of non-preclusion in guilty plea cases;" and (4) the officers provided no cases other than those involving subsequent habeas corpus proceedings where waiver was applied. These arguments are without merit.

Prosise then inconsistently concludes his brief by requesting a denial of certiorari so that the circuits can have more time to "fully analyze

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[1]See the case of *Metros v. United States District Court for District of Colorado*, 441 F.2d 313 (10th Cir. 1971), where the Tenth Circuit held that a guilty plea would bar the subsequent civil litigation of the arrest and the search that took place in the criminal case. Prosise did not address the petitioner's argument that the Fourth Circuit's decision also conflicts with decisions from the First and Ninth Circuits where it was held that prior pleas of guilty were waivers of the right to raise certain issues in a subsequent suit for a tax refund and in a suit for forfeiture. See *Frontneau v. United States*, 654 F.2d 8 (1st Cir. 1981), *United States v. $31,697.59 Cash*, 665 F.2d 903 (9th Cir. 1981). These cases do not involve habeas corpus.

and develop the precise nature of the relationship between 28 U.S.C. § 1738 and 42 U.S.C. § 1983 before answering the questions advanced by the petitioners." This conclusion suggests that the Petition does raise significant federal questions but that they should go without resolution pending the further development of a legal issue which the Fourth Circuit found it need not and should not address. *Prosise v. Haring*, 667 F.2d 1133, fn. 4 at 1138 (4th Cir. 1981). There are many reasons why the arguments advanced against the grant of a writ of certiorari are not persuasive, and they are set out below.

II. THE EFFECT OF 28 U.S.C. § 1738.

This Court need not reach the question of precisely how 28 U.S.C. § 1738 would work in a case where the state's law would *deny* preclusive effect to a guilty plea.[2] This is because Virginia

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[2]The *Prosise* circuit court admitted, the "exact operation of § 1738 and its relationship to the general policies of res judicata in the § 1983 context is not wholly clear." *Prosise v. Haring*, 667 F.2d 1133, fn. 4, 1138 (4th Cir. 1981). The *Prosise* court went on to note that a divergence of views exists "among both courts and commentators." *Id.* Serious problems of uniformity in the federal circuits would result if every state's rule of collateral estoppel were automatically followed because of the differences in the states' law. This Court may have answered some of these concerns in *Kremer v. Chemical Construction Corp.*, ___

(footnote continued)

law is not settled on this point. And contrary to what *Prosise* argues, the law in Virginia which does exist indicates a Virginia court would not permit Prosise's civil damage action.[3] What Prosise would have this Court believe is that the very same Virginia court which found that the search provided the factual basis for the conviction would allow Prosise to attack that conviction by claiming the search was unconstitutional.

The Virginia Supreme Court held in *Eagle, Etc. Insurance Co. v. Heller,* 149 Va. 82, 140 S.E. 314 (1927), that it would, given adequate justification, invoke collateral estoppel despite the usual

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(footnote continues)

U.S. ___, 102 S.Ct. 1883 (May 17, 1982). (§ 1738 requires federal court to use res judicata rule of state court which has effect of precluding Title VII federal action.)

[3]In adopting a flat-rule of non-preclusion as to unlitigated issues in guilty plea cases, the Fourth Circuit said such a rule "is conformable under 28 U.S.C. § 1738 to Virginia decisions respecting the preclusive effect of its criminal judgments." *Prosise, supra* at 1142. If this is meant to imply that Virginia would deny preclusive effect to Prosise's guilty plea in these circumstances, the petitioners would argue that such a conclusion is without support. See the text above. Petitioners interpret the Fourth Circuit's statement as simply recognizing the fact that the Virginia Supreme Court has not had an occasion to issue a published opinion in a similar case.

rule of mutuality. Estoppel was used defensively in the *Eagle v. Heller* case, when a convicted arsonist tried to recover on a fire insurance policy on the very house he burned.

More recently the court indicated in *Luke Construction Company v. Simpkins*, 223 Va. _____, 223 VRR 340 (April 30, 1932) (per curiam), that there are circumstances other than that of the *Eagle v. Heller* case where it would apply collateral estoppel despite the lack of mutuality. *Id.* at 223 VRR 341. Hence, *Eagle v. Heller, supra*, does not represent a "single limited exception to this general rule of non-preclusion...."[4] Although Prosise argues that Virginia's law of estoppel only applies to issues "actually litigated" and thus would never apply to a guilty plea situation, Virginia has never issued a published opinion on what issues, if any, might be necessarily decided

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[4]Prosise's argument that there was other "evidence independent of the search" (Opposition brief at page 8) that could have supported the plea cannot be taken seriously. Prosise provides no citation to any part of the record which would tend to support such a claim. The claim is directly contrary to the state court's express finding that the factual basis of the plea of guilty was the evidence produced by the search (Pet. App. at p. 58a) and ignores the difficult burden on the prosecution to prove the act of manufacturing drugs. The chemicals, apparatus and experts' analysis of the chemicals would be needed to convict.

by a guilty plea.[5] If one assumes that Virginia would be inclined to follow the "conventional" estoppel doctrine then one would expect Virginia to apply estoppel in at least some cases involving guilty pleas; even the *Prosise* court admits that actual litigation is not an element of the "conventional - or at least plainly emerging" doctrine of estoppel. *Prosise, supra* at 1140.

There are two additional elements present in *Prosise* which distinguish it from those Virginia cases relied on by Prosise. See, e.g., *Aetna Casualty & Surety Co. v. Czonka,* 200 Va. 385,

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[5]The officers have found one case where the Virginia Supreme Court has considered the preclusive effect of a guilty plea. In *Souders v. Gabrielson, et al.*, Record No. 741124, the Virginia Supreme Court denied a writ of error to a July 18, 1974, judgment of Charles S. Russell of the Arlington County Circuit Court (Law No. 15840). Judge Russell is now a member of the Virginia Supreme Court. The circuit court held that the civil plaintiff's prior plea of guilty to drunk in public and assault and battery of the arresting officers precluded the plaintiff's subsequent damage action against the arresting officers for unlawful use of force. The Virginia Supreme Court said that it reviewed the record in the circuit court and found "no reversible error." See the appendix to this reply for the plea of estoppel and res judicata, the circuit court's order sustaining the plea of res judicata and estoppel, the notice of appeal and assignments of error and the Virginia Supreme Court's denial of the writ of error.

105 S.E.2d 869 (1958). The first element in *Prosise* is the substantial identity of the parties in the criminal prosecution and in the subsequent § 1983 action. See *Moran v. Mitchell*, 354 F.Supp. 86 (E.D. Va. 1973). The second element is that the "causes of action" in the two proceedings are also substantially the same. According to the Virginia Supreme Court the scope of "cause of action" varies "with its context and is broadly characterized as an assertion of particular legal rights which have arisen out of a definable factual transaction." *Bates v. Devers*, 214 Va. 667, n. 8, 672, 202 S.E.2d 917, at n. 8, 921 (1974).

As can be seen, there is an absence of an authoritive determination by Virginia of the effects of collateral estoppel and waiver[6] after a guilty plea. Because of this, § 1738 does not prevent this Court from establishing a rule of preclusion to be applied in the federal courts in such circumstances. Using existing Virginia law as a guide, it would appear that the Virginia Supreme Court might very well give preclusive effect to Prosise's guilty plea. Certainly, a flexible rule of

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[6]The Fourth Circuit simply dismissed the notion of waiver on the grounds it was only applicable to subsequent habeas corpus proceedings. *Prosise, supra* at 1136-37. The circuit court did not discuss the question of whether Virginia would apply the principles of waiver to the case at bar.

preclusion is conformable under § 1738 to Virginia law.

III. THERE IS A CONFLICT IN THE CIRCUITS.

Prosise's argument that there is no conflict in the circuits on the questions presented to the Court is premised on a misunderstanding of what this Court said in *Allen v. McCurry*, 449 U.S. 90 (1980). He implies at pages 9 and 10 of his opposition brief that the Tenth Circuit would probably change its position in light of *Allen v. McCurry*. *See, Metros v. United States District Court*, 441 F.2d 313 (10th Cir. 1971). Prosise's speculation is premised on two points: (1) *Allen v. McCurry* noted that certain issues "arising out of the arrest are not necessarily decided by the conviction. *Allen* at 449 U.S. at 93 n. 2," and because (2) "*Allen* held that the availability of collateral estoppel as an affirmative defense would not prevent a § 1983 plaintiff from raising an issue he might have raised in his criminal trial but did not. *Id.* at [449 U.S.] at n. 5." Opposition brief at p. 10. However in footnote 2 of *Allen v. McCurry*, this Court specifically said only that "questions as to the scope of collateral estoppel with respect to the particular issues in this case are not now before us." In footnote 5, the *Allen* Court said that contrary to the claim of the

dissent "this case does not involve the question of whether a § 1983 claimant can litigate in federal court an issue he might have raised but did not raise in previous litigation." In sum, the *Allen v. McCurry* decision has not in the least weakened the analysis of the Tenth Circuit in *Metros;* in fact, the *Allen* decision removes a cloud over the *Metros* case which existed when some circuit courts refused to apply estoppel in cases where its application cut off access to a federal forum for the assertion of the constitutional issue.

The Tenth Circuit's analysis in *Metros* is as viable today as it was when it was first rendered. The *Metros* court examined the state court record and found that the search sought to be relitigated in the civil action was most important to the prior criminal prosecution and was an issue necessarily determined by the conviction. The court said:

> "It would seem unnecessary to discuss at length the effect of a plea of guilty as applied to the issue before us, other than to note a wider application of the preclusion rule to prior criminal cases where a guilty plea has been entered than to those actually tried. It is sufficient to note that such a plea is conclusive as to all but jurisdictional issues." *Metros v. United States District Court, supra* at 317.

A very recent case of the Fifth Circuit, which was unavailable to the Petitioners at the time of their filing, is *Southern Jam, Inc. v. Robinson*, 675 F.2d 94 (May 6, 1982). There the court examined the effect of *Allen v. McCurry* and concluded that "as long as the parties had a full and fair opportunity to litigate their constitutional allegations in the prior state court proceedings [citation ommitted], the defense of res judicata is viable in a subsequent § 1983 action." *Southern Jam, supra* at 97. In *Southern Jam* the circuit court applied Georgia law. Because the 1983 plaintiff had failed to raise any constitutional objections to an ordinance in a prior state court enforcement proceeding against the plaintiff, the plaintiff was barred by res judicata from raising the constitutional issues in the 1983 action.

As can be seen by the *Southern Jam* case, the doctrine of res judicata is also appropriate to the *Prosise* case. Virginia, like Georgia, also follows the rule that res judicata bars the subsequent litigation of all claims that were or could have been litigated in an earlier action between the same parties provided the claims arise from the same "cause of action." See the text above in Section II of this brief.

What is important is that the Fifth Circuit has taken the position that the doctrine to be

applied is res judicata while the Fourth Circuit considers the issue to be solely one of collateral estoppel. Assuming that the "federal law" of res judicata would be similar to Georgia law, there is now an additional conflict between the (former) Fifth and the Fourth Circuit.

IV. WAIVER AND THE FAILURE OF THE FOURTH CIRCUIT TO CONSIDER THE FINDING OF THE STATE COURT THAT THE SEARCH PROVIDED THE FACTUAL BASIS FOR THE PLEA.

The Fourth Circuit, and *Prosise* in his opposition brief, stated that no circuit court has applied waiver to any case other than a subsequent habeas corpus action. This is not correct. *See, United States v. $31,697.59 Cash,* 665 F.2d 903 (9th Cir. 1982) (plea of guilty is waiver of right to raise issue in subsequent forfeiture proceeding), *Cramer v. Crutchfield,* 648 F.2d 943 (4th Cir. 1981) (per curiam) (failure to raise constitutional issue at a trial is a waiver of right to pursue issue in subsequent 1983 action), *Larios-Mendez v. Immigration and Naturalization Service,* 597 F.2d 144 (9th Cir. 1979) (plea of guilty is waiver of right to raise constitutional issues in subsequent deportation proceedings).

Prosise argues that the Fourth Circuit did not overlook the express finding of the state court that the search and seizure was the very basis of

the conviction "but rather, rejected such an analysis in favor of a general rule of non-preclusion." Prosise goes on to say that the Fourth Circuit simply "rejected the factual basis of the plea as a useful way of determining the preclusive effect to be given his plea." Respondent's brief at pp. 10-11.

The petitioners have argued in this Court that had the Fourth Circuit examined the record in the state court, it would not have adopted a "flat-rule" of non-preclusion for search and seizure issues in guilty plea cases. Prosise takes the position at page 11 of his brief that the Fourth Circuit was fully aware of the record but found a review of the state court record not to be a "useful way of determining the preclusive effect to be given his plea." But even if one assumes that the Fourth Circuit did examine the record closely and did fully appreciate the ease with which one could see the importance the search played in Prosise's criminal case (and hence incentive to litigate), then there is even less logic to the following conclusion:

> "The question [of incentive to litigate in a guilty plea case] is so likely to be one incapable of fair and expeditious resolution in the run of § 1983 actions that we believe a rule of non-pre-

> clusion should obtain with respect to search and seizure issues in guilty plea cases." *Prosise, supra* at 1142.

Such an inflexible rule promotes no discernable judicial concerns and certainly is not compatible with the Virginia Court's view that preclusion will apply in "appropriate circumstances." Such a rule will surely increase the workload of the federal courts by requiring the full litigation of search and seizure claims in instances where any court would easily find them to have been claims crucial to the conviction and clearly demonstrating that the criminal had incentive to litigate "to the hilt."

CONCLUSION

The Fourth Circuit has adopted an inflexible rule of non-preclusion in guilty plea cases. The circuit court states that the "more important" reason behind its rule of non-preclusion is its belief that since *Stone v. Powell*, 428 U.S. 465 (1976), the "§1983 federal forum is now the only one available for the assertion of this particular constitutional claim." *Prosise, supra* at 1142. This kind of reasoning can be characterized as an implicit distrust of the state court system; it shows a continued belief that every person must have at least one opportunity to pursue consti-

tutional issues in federal courts. This rule is directly at odds with the principles set out in *Allen v. McCurry, supra, Stone v. Powell, supra,* and *Tollet v. Henderson,* 411 U.S. 258 (1973).

The *Prosise* case involves a very simple and clear record, and the issue presented is significant and currently subject to conflicting views in the Circuit Courts. This Court should grant the petition for writ of certiorari.

Respectfully submitted,

CHARLES G. FLINN
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Counsel for Petitioners

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(703) 558-2705
Counsel of Record and
Counsel for Petitioners

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 16th day of April, 1975.

The petition of Guthrie E. Souders for a writ of error to a judgment rendered by the Circuit Court of Arlington County on the 18th day of July, 1974, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Edward Gabrielson and others were defendants, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Testee: HOWARD G. TURNER
CLERK

By: /s/ ALLEN L. LUCY
DEPUTY CLERK

VIRGINIA:

IN THE CIRCUIT COURT OF
ARLINGTON COUNTY

AT LAW NO. 15840

[Recorded July 18, 1974]

GUTHRIE E. SOUDERS,

Plaintiff,

v.

EDWARD GABRIELSON, et al.,

Defendants.

O R D E R

This cause came on to be heard on the 10th day of June, 1974, on the Plea of Estoppel and Res Adjudicata filed by the defendants, Edward Gabrielson, Daniel Hartle, Stewart Pell and Harry Parr; and

The Court having considered the legal authorities presented by counsel, having taken testimony with relation to said Plea, having heard the argument of counsel and being of the opinion that said Plea should be sustained,

It is accordingly ORDERED and ADJUDGED that the Plea of Estoppel and Res Adjudicata filed

by the defendants, Edward Gabrielson, Daniel Hartle, Stewart Pell and Harry Parr, be and the same hereby is sustained.

It is further ORDERED that this action be and the same hereby is dismissed with prejudice, to which ruling of the Court the plaintiff, by counsel, duly excepted.

THIS ORDER IS FINAL.

ENTERED: July 18th, 1974

/s/ Charles S. Russell
Judge

SEEN:

SIMMONDS, COLEBURN, TOWNER & CARMAN

By /s/ George C. Towner, Jr.
Counsel for Defendants

/s/ Charles G. Flinn
Counsel for Defendants

SEEN AND OBJECTED TO:

/s/ Raymond D. Clark
Counsel for Plaintiff

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF ARLINGTON

AT LAW NO. 15840

[Filed August 16, 1974]

GUTHRIE E. SOUDERS,

Plaintiff,

v.

EDWARD GABRIELSON, et al.,

Defendants.

NOTICE OF APPEAL AND
ASSIGNMENTS OF ERRORS

TO: JOSEPH C. GWALTNEY,
CLERK of the Circuit Court for the
County of Arlington, Virginia
Courthouse
Arlington, Virginia 22201

NOTICE is hereby given that the Plaintiff, Guthrie E. Souders, by and through his counsel, Ralph R. Curry, appeals from a final Judgment rendered by this Honorable Court on the 18th day of July, 1974, and announces his intention of applying for a Writ of Error and Superseadeas to the Supreme Court of Virginia.

ASSIGNMENT OF ERRORS

1. The Trial Court erred in its finding and ruling in granting the Plea of Estoppel and Res Adjudicata in its order of July 18, 1974, the same being contrary to the law and the evidence of the case.

2. The Plea of Estoppel and Res Adjudicata was not timely filed, without sufficient advance or reasonable notice, and the evidentuary hearing held thereon was not in compliance with the Pre-Trial Order.

3. The Defendants failed to carry their burden of proof necessary to support the Court's finding and ruling to sustain their Plea of Estoppel and Res Adjudicata.

4. The Evidence was insufficient to support the Court's finding that the arrest was lawful and the Court erred in not allowing the question of facts thereon to be submitted to a jury.

5. The Court erred in finding the Plaintiff's pleadings and evidence did not raise a question of the use of excessive force by the Defendant and further erred in not allowing the facts thereof to be decided by a jury.

6. The Court erred in sustaining the Plea of Estoppel and Res Adjudicata in that the matter

was not determined between the same parties or privies, the issue determined in the prior criminal actions is not the same issues in the instant case, nor was the issues of facts in the instant case proved to have been actually litigated, nor was there proof that the Plaintiff had a full and fair opportunity in the prior criminal action, and the same clearly shows the contrary and that he was without counsel and that the test of mutuality is not applicable in this case, i.e., that both parties are equally bound thereby and if the outcome had been the opposite, that the other party would have been equally bound by the opposite result.

7. The Court erred in its confinement of issues and cross examination by counsel for the Plaintiff.

8. The Court made further error in asserting it was not concerned with the credibility of witnesses.

9. The Court erred in its finding that he was convicted of the offense for which the Defendants went to arrest him in that the same is irrelevant, immaterial and prejudicial to the Plaintiff on the issues, law and facts of the instant case.

10. The Court further erred in making a finding that the sobriety of the Plaintiff at the

time of the alleged arrest was not an essential element of probable cause.

11. The plea of guilty entered in the County Court, made without representation of counsel, does not support in the record that no one sought to imprison him in those cases.

STATEMENT

It is the intention of counsel for the Plaintiff to file hereafter transcripts, statements of fact, testimony, and other incidents of this case.

GUTHRIE E. SOUDERS

By: /s/ Ralph R. Curry
Counsel

/s/ Ralph R. Curry
Counsel for Plaintiff
2030 - 16th Street, North
Arlington, Virginia 22201

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 1974, I delivered a copy of the foregoing NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR, by hand, to George C. Towner, Jr., Esquire, counsel for Defendants, and to Charles G. Flinn, Esquire, Assistant County Attorney.

/s/ Ralph C. Curry

VIRGINIA:

IN THE CIRCUIT COURT OF
ARLINGTON COUNTY

AT LAW NO. 15840

GUTHRIE E. SOUDERS,

Plaintiff,

v.

EDWARD GABRIELSON, et al.,

Defendants.

PLEA OF ESTOPPEL AND
RES ADJUDICATA

Come now the defendants and file herein their Plea of Estoppel and Res Adjudicata and move the Court to dismiss this action filed herein against them and as their grounds therefor state as follows:

1. That on August 31, 1970, the plaintiff, Guthrie Eugene Souders, did plead guilty to and was found guilty of unlawfully and against the peace and dignity of the Commonwealth of committing an assault and battery upon the person of Officer Gabrielson, No. 336, on August 24, 1970, in the County Court of Arlington County, the same being T-83887, a copy of which is attached hereto and made a part hereof.

2. That on August 31, 1970, the plaintiff, Guthrie Eugene Souders, did plead guilty to and was upon the complaint of Officer Gabrielson found guilty of unlawfully and against the peace and dignity of the Commonwealth being drunk in a public place on August 24, 1970, in violation of the County Ordinance, in the County Court of Arlington County, the same being T-83886, a copy of which is attached hereto and made a part hereof.

3. That having pled guilty and having been found guilty of the charges as set forth above, the judgment of the County Court of Arlington County is binding upon the plaintiff in this proceeding and the plaintiff is precluded from reopening in this action the issues determined in that case and as such the findings of the County Court of Arlington County are conclusive upon the plaintiff.

4. That since this action arises from the arrest of the plaintiff on the charge of being drunk in public and the plaintiff's assault upon Officer Gabrielson and since the plaintiff has heretofore admitted being guilty to both of the charges, the plaintiff is estopped in this action from pursuing a claim against Officer Gabrielson and the other defendants arising from the plaintiff's own unlawful conduct.

WHEREFORE, these defendants pray that this action against them be dismissed with prejudice and that they be awarded judgment for the costs on their behalf expended.

EDWARD GABRIELSON, DANIEL HARTLE, STEWART PELL and HARRY PARR, Defendants

By /s/ George C. Towner, Jr.
Counsel

SIMMONDS, COLEBURN, TOWNER & CARMAN

By /s/ George C. Towner, Jr.
Counsel for Defendants

Certificate of Service

I hereby certify that a copy of the foregoing was delivered to Raymond D. Clark, Esquire, counsel for the plaintiff, this 7th day of June, 1974.

/s/ George C. Towner, Jr.

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